BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROBERT J. GROH, JR.	)	
Claimant	)	
VS.	)	
	)	Docket No. 206,815
UNITED PARCEL SERVICE	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the Award entered by Assistant Director Bradley E. Avery dated May 30, 1997. The Appeals Board heard oral argument on November 18, 1997, in Kansas City, Kansas.

APPEARANCES

Claimant appeared by his attorney, Keith L. Mark of Mission, Kansas. Respondent and its insurance carrier appeared by their attorney, Frederick J. Greenbaum of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and stipulations listed in the Award. The parties' regular hearing stipulations included a stipulation to a 14.5 percent permanent partial disability to the forearm.

ISSUES

The Assistant Director found claimant had proven a compensable injury but declined to award permanent partial disability benefits based upon a finding that claimant had not reached maximum medical improvement. Respondent appealed the findings and

conclusions of the Assistant Director concerning whether claimant provided timely notice of accident and whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent. Also, for the first time on appeal, respondent raised the issue of whether claimant was disabled from earning full wages for a period of at least one week pursuant to K.S.A. 44-501(c). Claimant and respondent agree that if the claim is found compensable and claimant is otherwise entitled to disability benefits, an award for permanent partial disability compensation should be entered based upon the parties' stipulation to a 14.5 percent impairment of function to the right forearm.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds claimant did not give timely notice of accident as required by K.S.A. 44-520. That statute provides as follows:

> **Notice of injury**. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Assistant Director found notice was timely given based upon the testimony of claimant's supervisor to the effect that he received notice about the time claimant received treatment by Dr. Robert R. Brown. Claimant first sought treatment for his right arm injury on November 1, 1995. However, claimant's date of accident was more than 10 days and also more than 75 days prior to November 1, 1995.

Claimant characterizes his injury as having been caused by repetitive use each and every working day beginning March 1, 1995, through November 11, 1995. However, the greater weight of the credible medical evidence is that claimant's fractured arm was more likely than not caused by a single traumatic event. Furthermore, although claimant's

continuing to work with the fractured arm likely caused claimant additional pain, the work did not result in any additional permanent injury.

Claimant first sought medical treatment for his injury on November 1, 1995, with the respondent's company physician, Dr. Brown at Occupational Health Centers. Dr. Brown is board certified in family medicine but has confined his practice to occupational medicine for the last two years. He first saw claimant on November 1, 1995, for complaints of wrist pain and tenderness. Claimant did not relate any specific traumatic event that caused his pain. Dr. Brown ordered an x-ray which appeared abnormal. Therefore, he sent it to a radiologist John Michael Quinn, M.D., for a second opinion. Dr. Quinn's report described a nonunion fracture of the carpal navicular of indeterminate age. Dr. Brown eventually referred claimant to Dr. Regina M. Nouhan for treatment.

Dr. Brown opined that it was not an acute injury but had happened in the past. Furthermore, Dr. Brown opined that claimant's job following the fracture did not cause permanent aggravation of the condition. The doctor did believe, however, that the sooner claimant obtained the necessary treatment the better the result that could be expected. In this sense time itself can be an aggravating factor. In Dr. Brown's opinion the fracture was caused by a single event and not by any repetitive type activity. An accident date in March of 1995 was indicated as that was the time frame claimant began experiencing his symptoms. All of claimant's symptoms would be the natural consequence of the original fracture injury. Neither claimant's condition nor the treatment that is necessary was changed by claimant's continuing to work for respondent from March through November of 1995. The mere passage of time is what has affected the condition. The medical treatment is due to the fracture and is not affected by the subsequent work activities, according to Dr. Brown.

An independent medical examination of claimant was performed by P. Brent Koprivica, M.D., at the request of claimant's attorney. Dr. Koprivica is board certified in emergency medicine. Ninety-eight percent of his practice consists of performing independent medical examinations. At his May 8, 1996, examination of claimant, Dr. Koprivica was given a different history from that given by claimant to Dr. Brown, Dr. Quinn, and Dr. Nouhan. Claimant now recalled two incidents where he had fallen at work during 1995 but could not recall specific dates. Claimant also recalled that the pain was more noticeable by June of 1995 and had become significant enough by August that he mentioned it to his supervisor. Dr. Koprivica opined that the hand activities claimant performed at work contributed to the nonunion of the fracture as well as increasing claimant's symptomatology. Dr. Koprivica described the fracture as resulting from a fall which occurred sometime around March of 1995.

Claimant was also examined by Lynn D. Ketchum, M.D., and his February 7, 1996, report is a part of the record. However, that report contributes very little to the history of claimant's injury or the issue of causation. According to Dr. Ketchum, claimant related his onset of pain as about June 1, 1995. In addition to his regular job duties, claimant

described several falls, although claimant did not remember any outstanding pain after any particular fall. Dr. Ketchum appears to attribute claimant's condition to a fall as opposed to repetitive work activities when he makes the statement "Mr. Groh told me that UPS has a policy that if the injury is not reported within 75 days, they are not responsible. Apparently that 75 day period was exceeded when he reported the injury, although he said he is not really sure of the exact date of the injury, because none of the falls had a specific pain associated with them." Dr. Ketchum concludes his report with the following:

> It is my opinion that this is not going to heal and will result in degeneration of the scaphoid and arthritis of the wrist. He does need an open reduction and internal fixation with a bone graft. It is also my opinion that, by history, this happened while he was in the course of doing his duties at UPS, as on specific questioning he denied having the injury prior to working at UPS and he denied having an injury while playing a sport that would have created pain in that area or a fall that would have created this problem. He did have several falls while working as a truck loader at UPS.

Claimant testified that his right wrist problems began in March of 1995. He first reported his wrist problems in August. He brought the subject up again in September and November when he was sent to Dr. Brown. He did not report any specific falls to his supervisor and claimant does not allege that respondent had actual knowledge of any accident. Thus, even accepting the chronology of events as testified to by claimant, his notice of accident given in August 1995 was more than 10 days and more than 75 days after his March 1995 accident. The claim is time barred by the provisions of K.S.A. 44-520.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director Bradley E. Avery dated May 30, 1997, should be, and is hereby, reversed. Claimant is denied an award of compensation against the respondent and its insurance carrier for workers compensation benefits.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Gene Dolginoff Associates, LTD	
Completed Regular Hearing	$354.00
Deposition of P. Brent Koprivica, M.D.	440.75
Deposition of DeLois McPherson	173.50
	$968.25
Metropolitan Court Reporters, Inc.	
Regular Hearing transcript	$ 86.50

Hostetler & Associates, Inc.
Evidentiary deposition of Robert R. Brown, D.O. $363.45

Richard Kupper & Associates
Preliminary Hearing transcript $330.95

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Frederick J. Greenbaum, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director